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**SPECIAL COUNSEL TO THE DEBTORS**

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

<b>IN RE:</b>	§	
	§	
<b>VARTEC TELECOM, INC., et al.,</b>	§	<b>CASE NO. 04-81694-SAF-11</b>
	§	<b>(Chapter 11)</b>
<b>DEBTORS.</b>	§	<b>(Jointly Administered)</b>
	§	

**EXPEDITED MOTION TO CONTINUE HEARING ON THE  
MOTION TO SHORTEN TIME PERIOD FOR THE DEBTORS TO ASSUME OR  
REJECT THE SBC TELCOS' EXECUTORY CONTRACTS (AND BRIEF IN SUPPORT)**

TO THE HONORABLE H. DEWAYNE HALE, UNITED STATES BANKRUPTCY JUDGE:

The above-referenced debtors and debtors in possession (collectively, the “Debtors”) file this Expedited Motion to Continue Hearing on the Motion to Shorten Time Period for the Debtors to Assume or Reject the SBC Telcos' Executory Contracts (and Brief in Support), and in support thereof the Debtors would show as follows:

## I. RELEVANT BACKGROUND

1. Prior to November 1, 2004 (the "Petition Date"), the Debtors<sup>1</sup> entered into various agreements, including interconnection agreements, circuit agreements, and/or billing collection agreements (collectively, the "Agreements") with the SBC telephone companies<sup>2</sup> (hereafter collectively, "SBC", "SBC Telcos" or "Carrier").

2. Since the Petition Date, the Debtors have not sought to assume any of the Agreements.

3. On December 2, 2004, the Court entered its Stipulation and Consent Order by and Among Certain Carriers and the Debtors Regarding Adequate Assurance/Adequate Protection of Future Payments [Docket No. 451] (the "Carrier Stipulation"). Generally, under the Carrier Stipulation the Debtors pay, in advance, set amounts semi-monthly to SBC and other carriers on a postpetition basis. Such payments are more favorable to SBC than what is required under the Agreements.

4. On July 1, 2005, eight months after the Petition Date, the SBC Telcos filed the Motion to Shorten Time Period for the Debtors to Assume or Reject the SBC Telcos' Executory Contracts [Docket No. 1454] (collectively, the "SBC Motion"). BellSouth, Qwest, and Verizon filed similar motions on the same date (the "Motions"). SBC and the other carriers ask for various forms of relief related to compelling the Debtors to assume or reject all agreements,

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<sup>1</sup> The Debtors include VarTec Telecom, Inc., Excel Communications Marketing, Inc., Excel Management Service, Inc., Excel Products, Inc., Excel Telecommunications, Inc., Excel Telecommunications of Virginia, Inc., Excel Teleservices, Inc., Excelcom, Inc., Telco Communications Group, Inc., Telco Network Services, Inc., VarTec Business Trust, VarTec Properties, Inc., VarTec Resource Services, Inc., VarTec Solutions, Inc., VarTec Telecom Holding Company, VarTec Telecom International Holding Company, and VarTec Telecom of Virginia, Inc.

<sup>2</sup> The SBC Telcos are: Southwestern Bell Telephone, L.P., Pacific Bell Telephone Company, The Southern New England Telephone Company, Illinois Bell Telephone Company, Indiana Bell Telephone Company Incorporated, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, Wisconsin Bell, Inc., Nevada Bell Telephone Company, and The Woodbury Telephone Company.

which number in the thousands. SBC and the carriers have set the SBC Motion and the Motions for hearing on July 25, 2005 at 1:30 p.m., the same date and time as the auction of substantially all of the Debtors' assets (see below).

5. On July 13, 2005, Vinson & Elkins L.L.P., as attorneys to the Debtors, filed the Debtor's expedited motion to continue the hearing on the Motions. As special counsel to the Debtors, Kane, Russell, Coleman & Logan, P.C., now files a substantially similar expedited motion to continue the hearing concerning the SBC Motion.

## **II. THE SALE MOTION AND SALE PROCEDURES ORDER**

6. After an extensive marketing effort and negotiations with numerous potential stalking horse bidders, on June 17, 2005, the Debtors filed their Motion for Authority to Sell Assets Free and Clear of All Liens, Claims, Rights, Interests, and Encumbrances and for Related Relief (Substantially All of Debtors' Remaining Assets) [Docket No. 1399] (the "Sale Motion") and their Expedited Motion for Order (A) Approving Sale Procedures and Bid Protections in Connection with Sale of Certain Assets; (B) Scheduling an Auction and Hearing to Consider Approval of the Sale; (C) Approving Notice Relating to Sale; and (D) Granting Related Relief (Sale of Substantially All of the Debtors' Remaining Assets) [Docket No. 1401] (the "Sale Procedures Motion"). On June 30, 2005, the Court entered its order approving the Sale Procedures Motion [Docket No. 1446] (the "Procedures Order"). In the Sale Motion, the Debtors requested, among other things, approval of the sale of significant assets to Leucadia National Corporation ("Leucadia"), or another successful bidder (the ultimate successful bidder being hereinafter the "Buyer"), under that certain Asset Purchase Agreement dated June 17, 2005 (the "APA"), or a similar agreement executed by the Buyer. Under the Procedures Order, the

auction will occur on July 25, 2005 (the “Auction Date”) and the hearing to approve the sale of the assets will occur on July 27, 2005 at 9:00 a.m. (the “Sale Hearing”).

7. Under the APA, the “Final Closing Date” is the date, *inter alia*, when critical regulatory approvals have been obtained for the transaction contemplated by the APA and the Debtors receive the final purchase price payment. Essentially, the Final Closing Date is the last step to consummating the sale of the Debtors’ assets to the Buyer.

### **III. RELIEF REQUESTED**

8. The Debtors request the hearing on the SBC Motion be continued until after the Final Closing Date, i.e., after necessary regulatory approvals of the transfer of the Debtors' assets to the Buyer as required by various state and federal governmental agencies. As certain carriers recognize in their Motions, the Debtors’ cases have been pending for at least eight (8) months, yet SBC and the other carriers felt no urgency to compel the assumption or rejection of agreements until now. It seems no accident, however, that SBC filed the SBC Motion, and the other carriers filed their Motions on July 1, 2005, the last day to file a motion (on a non-expedited basis) to be heard on the Auction Date. Regardless, given the state of these cases and the pending sale process, it is premature to consider the SBC Motion now.

9. SBC is attempting to (a) gain leverage against the Debtors in the sale process by forcing the decision to assume or reject prior to the granting of the voluminous regulatory approvals required in advance of the Debtors being able to assign the Agreements to the Buyer, (b) muddy the issues before the Court related to the sale and create unnecessary concern and potential risk for the “stalking horse” Leucadia, in an effort to compel Leucadia to immediately negotiate acceptable cure and assumption terms, and (c) chill the bidding process by chasing off other potential bidders who would be faced with having to make their decision, and potentially

pay substantial cure costs, without knowing if regulatory approval will ultimately be received. Further, the SBC Motion is inappropriately being crammed into the same week as the Sale Hearing and on the same day as the Auction Date when no emergency exists for addressing this issue as demonstrated by SBC's inaction during the first eight months of the cases. SBC should not be permitted to manipulate the process to detrimentally impact the sale of the Debtors' assets, a major turning point in these cases.

10. SBC is not and will not be harmed if the SBC Motion is heard after the Final Closing Date. The SBC Motion conveniently fails to mention that SBC is receiving postpetition payments on terms superior to its prepetition arrangements with the Debtors under the Agreements. Under the Carrier Stipulation, SBC is receiving postpetition adequate protection payments in exchange for agreeing to provide postpetition services. The sale of the Debtors' assets will not affect the Carrier Stipulation or the adequate protection payments, thus there is no harm – economic or otherwise – to SBC if the SBC Motion is continued until after the Final Closing Date.

11. Moreover, the Sale Procedures do not require the Buyer to elect which unexpired executory contracts or leases such Buyer will seek in the future to have the Debtors assign. Thus, any relief sought by SBC cannot be forced upon the Buyer through the sale process. Further, SBC and the other carriers are well aware that the Debtors currently lack the necessary funding to cure and assume agreements, making the timing of the SBC Motion and the Motions all the more suspect. One must wonder whether SBC and the other carriers are acting as creditors or competitors in urging the SBC Motion and the Motions at this time.

12. This Court has the discretion to grant a motion to continue. *See Resolution Trust Corp. v. Chisholm Federal Savings and Loan Ass'n*, 951 F.2d 657, 663 (5th Cir. 1992) (noting EXPEDITED MOTION TO CONTINUE HEARING ON THE MOTION TO SHORTEN TIME PERIOD FOR THE DEBTORS TO ASSUME OR REJECT THE SBC TELCOS' EXECUTORY CONTRACTS (AND BRIEF IN SUPPORT)--Page 5 of 7

the appellate court reviews the lower court's decision on a continuance for abuse of discretion); *In re Industrial Commercial Electric, Inc.*, 319 B.R. 35, 46 (D. Mass. 2005) (holding the proper standard of review for the district court to use when reviewing the bankruptcy court's decision regarding a continuance was abuse of discretion). Here, the Court has ample reasons within its discretion to continue the hearing on the SBC Motion until the Final Closing Date.

13. The Debtors will avoid addressing the lack of merit of the SBC Motion at this time. Suffice it to say that SBC falls desperately short of meeting its burden to compel the Debtors to assume or reject the Agreements. The Debtors will elaborate on these issues in their forthcoming objection to the SBC Motion.

#### **IV. PRAYER**

14. The Debtors respectfully request the Court continue the hearing on the SBC Motion until the Final Closing Date as defined in the APA. The Debtors request other such relief to which they are justly entitled.

Dated: July 13, 2005.

Respectfully submitted  
**KANE, RUSSELL, COLEMAN & LOGAN, P.C.**

BY: /s/ Joseph M. Coleman

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**AFFIDAVIT AND CONSENT**

Pursuant to L.R. 40.1, I, Michael G. Hoffman, do verify and support the continuance requested above. I further certify that I believe the facts in support of the continuance set forth herein are true and correct to the best of my knowledge.

*/s/ Michael G. Hoffman*

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Michael G. Hoffman  
CEO of the Debtors

**CERTIFICATE OF CONFERENCE**

On July 13, 2005, Joseph M. Coleman, one of Debtors' counsel, attempted to confer by telephone with David Bennett, counsel for SBC, concerning the substance of this motion. Mr. Coleman was unable to speak with Mr. Bennett at that time.

*/s/ Michael L. Scanlon*

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Michael L. Scanlon

**CERTIFICATE OF SERVICE**

This is to certify that on July 13, 2005, a copy of the foregoing document was served by the Electronic Case Filing System for the United States Bankruptcy Court for the Northern District of Texas. A separate certificate of service shall be filed with respect to those parties on the Master Service List who do not receive electronic e-mail service.

*/s/ Michael L. Scanlon*

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Michael L. Scanlon